No. 86-1891

(5)

Supreme Court, U.S.
FILED
JUN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

MICHAEL J. HALLIWELL,
Appellant,

VS.

MARCH FONG EU,
SECRETARY OF STATE OF THE
STATE OF CALIFORNIA,
Appellee,

AND

THE SENATE AND ASSEMBLY OF THE
STATE OF CALIFORNIA,
Appellee-Intervenors.

On Appeal from the
Eastern District of California
(Three-Judge District Court)

MOTION OF THE ASSEMBLY OF THE STATE OF CALIFORNIA TO DISMISS OR AFFIRM AND APPENDIX

JOSEPH REMCHO
KATHLEEN J. PURCELL*
BARBARA S. GAAL
JULIE M. RANDOLPH
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, #800
San Francisco, California 94104
Telephone: 415/398-6230
Counsel for the California Assembly

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether a jurisdictional statement is timely when it was filed 22 months after judgment, nine months after the Ninth Circuit Order transferring the appeal to this Court, six months after the Ninth Circuit denied a first petition for rehearing and 90 days after summary denial of an untimely second petition; and, if not, whether this Court should excuse that untimeliness in a case that raises no substantial federal question and for a plaintiff whose persistent refusal to abide by court rules has led the courts below to direct their clerks to refuse to accept further communications from him.

TABLE OF CONTENTS

	Page
Question presented	i
Introduction	1
Statement of the case	3
Argument	11
I	
Plaintiff's appeal is untimely	11
II	
This case does not present any substantial federal issues	15
Conclusion	20

TABLE OF AUTHORITIES CITED

Cases

Page

AFSME v. Ogilvie, 465 F.2d 221 (7th Cir. 1972) 16

Assembly v. Deukmejian, 30 Cal.3d 638, *cert. denied and app. dismissed sub nom.* Republican National Committee v. Burton, 456 U.S. 941 (1982) 3, 17, 19

Badham v. Eu, 568 F.Supp. 156, 158 (N.D. Cal.), *aff'd,* 721 F.2d 1170 (1983), *cert. denied,* 470 U.S. 1084 (1984) .. 18

Badham v. Eu, No. C-83-1126 (N.D. Cal.) 18

Bowman v. Loperena, 311 U.S. 262 (1940) 12, 13

Broadway v. City of Montgomery, 530 F.2d 657 (5th Cir. 1976) 16, 17

Brown v. Thomson, 462 U.S. 835 (1983) 17

B.R.S. Land Investors v. United States, 596 F.2d 353, 356 (9th Cir. 1979) 17

Celanese Co. of America v. Vandalia Warehouse Corp., 424 F.2d 1176 (7th Cir. 1970) 17

Connor v. Finch, 431 U.S. 407 (1977) 17

Davis v. Bandemer, ____ U.S. ____, 106 S.Ct. 2797 (1986) 18

Donovan v. Richland County Ass'n for Retarded Citizens, 454 U.S. 389 (1982) 12

Gaffney v. Cummings, 412 U.S. 735 (1973) 18

Glesenkamp v. Nationwide Mutual Ins. Co., 71 F.R.D. 1, 4 (N.D. Cal. 1974), *aff'd per curiam,* 540 F.2d 458 (9th Cir. 1976) 19

Hazen v. Southern Hills Nat'l Bank of Tulsa, 414 F.2d 778 (10th Cir. 1969) 16

Klein v. Trustees of Indiana University, 766 F.2d 275 (7th Cir. 1985) 16

Lincoln v. California Adult Authority, 435 F.2d 133 (9th Cir. 1970) 16

Mapco, Inc. v. Carter, 573 F.2d 1268 (Temp. Emer. Ct. App. 1978), *cert. denied,* 437 U.S. 904 (1978) 16

Mertens v. Hummell, 587 F.2d 862 (7th Cir. 1978) 17

Morrow v. Topping, 437 F.2d 1155 (9th Cir. 1971) 16

TABLE OF AUTHORITIES CITED

CASES

Page

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144 (1942) 8, 9, 13

Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966) 14

Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 (1964) 18, 19

Powers v. Dole, 782 F.2d 689 (7th Cir. 1986) 17

Republican National Committee v. Burton, 456 U.S. 941 (1982) 4, 19

Roberts v. Arizona Board of Regents, 661 F.2d 796 (9th Cir. 1982) 19

Roch v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) 18

Rospindale Cooperative Bank v. Greenwald, 638 F.2d 258 (1st Cir.), *cert. denied,* 454 U.S. 831 (1981) 16

Shapiro v. Doe, 396 U.S. 488 (1970) 14

Southway Discount Center v. City of Birmingham, 568 F.2d 456 (5th Cir. 1978) 15

St. Louis Union Trust Co. v. United States, 617 F.2d 1293 (8th Cir. 1980) 17

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 16

United States v. Johnson, 457 U.S. 537 (1982) 13

United States v. Webb, 655 F.2d 977 (9th Cir. 1981) 17

Vickery v. Fisher Governor Co., 417 F.2d 466 (9th Cir. 1969) 17, 19

Weiser v. White, 505 F.2d 912 (5th Cir.), *cert. denied,* 421 U.S. 993 (1975) 15

White v. Regester, 412 U.S. 755 (1973) 17

Will v. United States, 389 U.S. 90, 95 (1967) 18

Wong v. Bell, 642 F.2d 359 (9th Cir. 1981) 19

Wyatt v. Kaplan, 686 F.2d 276 (5th Cir. 1982) 17

TABLE OF AUTHORITIES CITED

Constitution

Page

Cal. Const.:
- Art. II, § 9 3
- Art. IV, § 8(d) 18

Statutes and Rules

12 U.S.C. § 1253 15

28 U.S.C.:
- § 1253 11
- § 2101(c) 11
- § 2284 5
- § 2284(b)(3) 16

Cal. Elections Code:
- §§ 30000, et seq. 3
- §§ 30010-30011 17
- §§ 30020-30022 18

Fed. R. Civ. Pro.:
- Rules 15 and 21 7
- Rule 15(a) 17
- Rule 56(e) 16
- Rule 78 16

Supreme Court Rules:
- Rule 11.3 13
- Rule 12 11
- Rule 20 11
- Rule 20.4 13

Miscellaneous

13 Moore's Federal Practice ¶ 607.04[12], at 9-31 14

No. 86-1891

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

MICHAEL J. HALLIWELL,
Appellant,

VS.

MARCH FONG EU,
SECRETARY OF STATE OF THE
STATE OF CALIFORNIA,
Appellee,

AND

THE SENATE AND ASSEMBLY OF THE
STATE OF CALIFORNIA,
Appellee-Intervenors.

On Appeal from the
Eastern District of California
(Three-Judge District Court)

MOTION OF THE ASSEMBLY OF THE STATE OF CALIFORNIA TO DISMISS OR AFFIRM

INTRODUCTION

As the jurisdictional statement and the 1070 pages of annotated appendices suggest, the record in this case is confused. Much of it consists of appellant's repeated requests for clarification and reconsideration and his attacks, first on counsel, then on the Chief Judge of the Eastern District of California, the three judge district court and finally the Ninth Circuit panel. It comes as no surprise then that his "Questions Involving Supreme Court Considera-

tion" end with a request that this Court decide, with the help of a special master, whether the rejection of his claims by the courts below may be deemed "to constitute a breach of the good behavior requirement which limits the tenure of federal judges under Article III . . . . " Jurisdictional Statement at x.

It should be clear from the opinions and orders below that appellant (hereafter "plaintiff") received full and fair consideration of his claims. He just did not get the results he sought. It is true that eventually both the district court and the Ninth Circuit became so exasperated with plaintiff that each finally ordered him not to file further documents. But the Ninth Circuit has been telling him for three years that it has no jurisdiction over his purported appeal and the three judge District Court issued a lengthy and responsive opinion on the merits before deciding that no further purpose would be served by permitting plaintiff to file yet another amended complaint.

Plaintiff's 222-page second amended complaint challenged California's court-ordered 1982 reapportionment plans with a multitude of theories ranging from those that were merely frivolous (Guaranty Clause challenges to reapportionment plans) to those that were clearly improper (attempts to name the California Supreme Court as a party defendant). Not one of California's 24 million people joined him in his challenge. The plans that plaintiff challenged in his second amended and earlier complaints are no longer in effect; they were last used in November 1982. And the district court rightly refused to allow amendment to challenge new plans a year after they had been enacted and after the court had already dismissed or granted summary judgment on similar legal claims.

The California Assembly files this motion primarily to point out what appellant's hundreds of pages might otherwise obscure: the jurisdictional statement, filed 22 months after judgment, nine months after the Ninth Circuit order transferring his appeal to this Court, six months after the Ninth Circuit denied his first petition for rehearing and 90 days after summary denial of an untimely second petition, is itself clearly untimely and should not be considered by this Court. Even if the untimeliness could be

excused, plaintiff fails to present any issue that merits further argument before this Court.

STATEMENT OF THE CASE[1]

On January 28, 1982, the California Supreme Court entered its decision in *Assembly v. Deukmejian*, 30 Cal.3d 638, *cert. denied and app. dismissed sub nom. Republican National Committee v. Burton*, 456 U.S. 941 (1982). It ruled that under California's referendum provisions, Cal. Const., art. II, § 9, the filing of a referendum petition against California's 1981 reapportionment plans served to stay the effect of the reapportionment statutes pending approval or disapproval by popular vote at the June 1982 election.

The Court then had to decide which Assembly and congressional districts should be used for the June 1982 primary and November 1982 general elections. With respect to congressional districts, the Court held that the only practical and constitutional alternative available was the districting plan that the Legislature had enacted in 1981. As to state legislative districts, the Court held that the Legislature's plan more nearly comported with the mandates of equal protection than did the former districting plan, which was the only other practical alternative, and that use of the new plan would minimize any disruption to the election process. Consequently, the Court ordered use of these plans as temporary judicial reapportionment plans for the 1982 June primary and the November general elections only.[2] 30 Cal.3d at 678. A petition for

---

[1] The proceedings in this case have been lengthy and convoluted, mostly as a result of the many filings and other communications between plaintiff and the courts. We do not here review every step in the proceedings. Rather, we have limited ourselves to reviewing major rulings by the courts below and actions of which plaintiff complains here. As a result, the history of this case may look more straightforward than it really is.

[2] The referendum succeeded and new plans were enacted in January 1983. *See* Cal. Elections Code §§ 30000 *et seq.* Plaintiff, nonetheless, continued to pursue his challenge to the court-ordered interim plans.

certiorari to this Court was denied on April 26, 1982. *Republican National Committee v. Burton*, 456 U.S. 941 (1982).

Michael Halliwell filed an amicus curiae brief in *Assembly v. Deukmejian*. On February 19, 1982, after the decision of the California Supreme Court, and acting in pro per, Mr. Halliwell filed a 222-page complaint in the Federal District Court for the Eastern District of California, challenging the validity of the interim court-ordered reapportionment plans. *See* App. A at 37.[3] He named as defendant the Secretary of State of the State of California. On March 11, 1982, he filed an equally lengthy amended complaint. The Assembly and the Senate of the State of California intervened as party defendants. *Id.*

Motions to dismiss were filed on the grounds that the court lacked jurisdiction and the complaint failed to state a claim. In a lengthy Order, the district court reviewed the many legal theories advanced by plaintiff and decided that most of them either failed to state a claim or were beyond the court's jurisdiction. App. A at 36-87 (Order filed July 1, 1982). It concluded, however, that in some respects plaintiff could state a claim over which the court had jurisdiction and upon which relief could be granted. The court, therefore, dismissed the 222-page complaint, but instructed plaintiff to file a new complaint as follows:

> That pleading shall be denominated "Second Amended Complaint," and shall set forth a short and plain statement of those claims which are cognizable in this court—*i.e.*, the claims based on the alleged violation of the plaintiff's voting rights protected by the "one person, one vote" guarantees of the United States Constitution. The new complaint shall also contain a concise statement of the relief which the plaintiff seeks; the details of plaintiff's proposals should not be included. Finally, the plaintiff is directed *not* to assert any claims that have been discussed in this order and dismissed without leave to amend.

---

[3] "App. A" is a reference to petitioner's "Appendix A to Jurisdictional Statement," filed herein on May 27, 1987. "App. B" refers to petitioner's "Appendix B to Jurisdictional Statement."

App. A at 85-86.

The court also ordered that all further proceedings in the case be presided over by a three-judge court, pursuant to 28 U.S.C. § 2284. App. A at 38, 86.

Plaintiff was not satisfied. He filed a Second Amended Complaint accompanied by a request for reconsideration. Before that matter could be heard in the district court, he also filed an "appeal" in the Ninth Circuit Court of Appeals. *See* App. A at 123 *et seq.* On August 31, 1982, the three-judge district court entered its order vacating hearing on the reconsideration motion while the appeal was pending. App. A at 152-54. On September 28, 1982, the Ninth Circuit dismissed plaintiff's appeal for lack of jurisdiction. App. A at 123-24. Plaintiff sought reconsideration in the Ninth Circuit, which was denied. App. A at 128-30 (Oct. 22, 1982 Order). He then filed an "emergency" request for en banc rehearing, which was denied as untimely. App. A at 138-39 (Oct. 26, 1982 Order).[4]

---

[4] This was not the end of plaintiff's dealings with the Ninth Circuit on this issue. Rather, plaintiff then began to write Chief Judge Browning requesting reinstatement of the appeal and complaining that the Ninth Circuit Clerk's office had directed him to remove his eight boxes of documents. This culminated in a January 3, 1983 Order from the Ninth Circuit, stating in part:

> Appellant's December 15, 1982 petition for reinstatement of this appeal is denied. In light of appellant's apparent unwillingness or inability to comprehend the limits on this court's jurisdiction noted in our prior orders, a detailed explanation of the errors in appellant's latest petition would serve no useful purpose. We have considered appellant's contentions, however, and find them devoid of merit.
>
> The appeal has been dismissed, the mandate has issued, and no further requests for reconsideration will be entertained. If appellant believes that review of this court's actions is necessary, his remedy lies in an application to the United States Supreme Court. Further attempts to obtain reconsideration by this court may result in the imposition of sanctions.
>
> App. A at 143.

In the meantime, plaintiff went back to the district court with a motion for preliminary injunction to stop the November 1982 elections; the motion was orally denied on October 27, 1982. *See* App. A at 175-76. Plaintiff then requested a "temporary injunction" enjoining the Secretary of State from certifying the results of the November 1982 elections. On this request for "temporary injunction," plaintiff asked for a private, ex parte conference with each of the three judges. *See* App. A at 177. On November 1, 1982 the three-judge district court entered its written order denying plaintiff's requests. App. A at 173-92. That same date, plaintiff petitioned the United States Supreme Court, Justice Rehnquist sitting as Circuit Justice, for a temporary injunction to enjoin the counting of the ballots; the request was denied. Assembly App. at A-1 (Oct. 29, 1982 letter from S.Ct. Clerk).

The case went forward in the district court. On April 19, 1983, the three-judge district court entered its Memorandum and Order Following Hearing addressing various motions filed by the parties. App. A at 252-73. It denied plaintiff's motion to recuse Judge Karlton. It reconsidered and affirmed Judge Karlton's Order of July 1, 1982 dismissing certain of plaintiff's claims without leave to amend. It denied the Secretary of State's Motion to Dismiss and the Assembly's Motion to Dismiss for Failure to Join Indispensable Parties. It took under submission the Senate's motion to dismiss and plaintiff's motion for a preliminary injunction to unseat three state senators and order special elections. Finally, it established a procedure for filing briefs on the Assembly's motion for summary judgment and on plaintiff's motion for a preliminary injuction to require the state to hold special elections in all disputed electoral districts.

On March 27, 1984, the three-judge district court entered its Order dismissing plaintiff's challenges to the Senate districts, denying plaintiff's motion for a preliminary injunction, and granting the Assembly's Motion for Summary Judgment. App. A at 297-35. In this same Order, the court expressed its reservations about the adequacy of plaintiff's challenge to the congressional districts, but rather than dismissing outright, called for briefing on the sufficiency of plaintiff's complaint in this respect. *Id.* at 327; 330-32. Finally, the court noted the problems posed by plaintiff's

apparent attempt to add the California Supreme Court as a party to the case, and decided that it did not need to address the "legion" of problems presented by plaintiff's course of conduct in this regard because his failure to comply with Fed.R.Civ.Pro. Rules 15 and 21 was dispositive. *Id.* at 327-30.

Plaintiff's response was to file what appeared to be a request for reconsideration in the district court (*See* App. A at 387) while at the same time filing a notice of appeal to the Ninth Circuit. [5]App. A at 404 *et seq.* On April 26, 1984, the Ninth Circuit Clerk's office wrote to plaintiff informing him: "We have contacted the district court and advised that your appeal from the three judge decision is direct to the Supreme Court." Assembly App. at A-2. Plaintiff did not pursue this appeal.

Instead, he filed motions in the district court to add the California Supreme Court as a party defendant and to amend or supplement his complaint. The motions were denied by Order filed April 4, 1985. App. A at 430-32.

Pursuant to the court's direction, further briefing was submitted on plaintiff's challenge to the congressional plan.[6] The Secretary of State argued that the claim should be dismissed as moot

---

[5] Plaintiff had previously filed what he called "An Application to Justice Rehnquist Seeking Enforcement of 28 U.S.C. § 2284." This was followed by correspondence complaining of the Supreme Court Clerk's handling of his papers. On May 9, 1984, the Clerk wrote plaintiff informing him that on May 7, 1984, Justice Rehnquist has endorsed on his papers, "Treating the papers filed as an application under Rule 43, the application is denied." Assembly App. at A-3. Plaintiff then filed "An Application to Justice Rehnquist Seeking Clarification of His Ruling of May 7, 1984," which was returned by the Clerk. *Id.* at A-4. As of June 11, 1984, plaintiff had resubmitted all of his papers with letters addressed separately to the Clerk of the Supreme Court and Justice Rehnquist. *Id.* at A-5 to A-8.

[6] In the meantime, plaintiff sought discovery on the reapportionment plans. The court's rulings on motions to dismiss and for summary judgment made this discovery unnecessary and inappropriate. Plaintiff nonetheless complains to this Court that he was unjustly denied discovery. Jur. Stmt. at 52-55.

because the districts challenged in the second amended complaint had not been used since 1982. On July 9, 1985, the three-judge court entered its unanimous Order granting the motion and dismissing the entire action without leave to amend. App. A at 440-49. Judgment was entered the same day. Assembly App. at A-9 to A-10. Plaintiff filed a motion for reconsideration, which was denied by Order of August 5, 1985. App. A at 509-511.[7]

On or about September 3, 1985, plaintiff filed what he designated a "Notice of Appeal" to the Ninth Circuit from the district court's Order of August 5, 1985, denying reconsideration. App. B at 102 *et seq.*

Although the proceedings in the Ninth Circuit were designated an appeal, plaintiff also referred to them as a request for mandamus and disclaimed any interest in review or ruling on the merits of the case. *See, e.g.*, App. B at 103, 105. For example, in his so-called Notice of Appeal plaintiff concluded:

> This appeal does not seek reversal of any substantive decisions by the District Court, but only the enforcement of Plaintiff's Due Process rights in the eight areas explained above so that a proper factual record may be compiled which will allow the U.S. Supreme Court to properly evaluate the merits of Plaintiff's claim.

App. B at 123-24.

The Assembly and other parties moved to dismiss the appeal on the alternative grounds that if it was an appeal on the merits it should be addressed directly to the Supreme Court and if it was in the nature of a mandamus proceeding,[8] the appeal should be dismissed and mandamus denied.

---

[7] Apparently ignoring the three-judge court's order dismissing the action, the entry of judgment and the August 5, 1985 denial of reconsideration, plaintiff continued to file motions in the district court. The district court has not acted on these motions.

[8] For example, "[a]n appeal does not lie from the denial of a petition for rehearing." *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144,

The Ninth Circuit, in an Order filed August 19, 1986, ruled as follows:

> The Supreme Court has exclusive jurisdiction over this appeal. 28 U.S.C. § 1253; MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Fusari v. Steinberg, 419 U.S. 379 (1975). Appellees' motions to dismiss the appeal for lack of jurisdiction are denied. The Clerk will transfer the appeal to the Supreme Court of the United States. 28 U.S.C. § 1631.

App. A at 660.

Plaintiff filed a petition for reconsideration which was denied by the Ninth Circuit on November 5, 1986. App. A at 664-65. After waiting a month, plaintiff on December 3, 1986 filed requests for "clarification", for a stay of the transfer of his appeal and for en banc hearing. *See* App. A at 672; Assembly App. at A-11, A-12 to A-14.

Plaintiff also began a series of submissions to this Court, commencing with a January 22, 1987 application to Justice O'Connor to stay proceedings in the Supreme Court until the Ninth Circuit clarified its order transferring the "Petition for Mandamus" to the Supreme Court. Apparently, the Clerk's office called Mr. Halliwell, because on or about January 29, 1987, plaintiff wrote to Justice O'Connor noting the clerk's call and asking that his papers be treated as a request for extension of time to docket an appeal. On February 9, 1987, the Supreme Court Clerk wrote back to plaintiff informing him that his application could not be filed without copies of the district court orders. On or about February 23, 1987, plaintiff wrote back to the Clerk enclosing copies of the district court orders with his supposedly explanatory annotations. On February 26, 1987, the Supreme Court Clerk returned plaintiff's papers, informing him that the request for extension of time was out-of-time: counting from the Ninth Circuit denial of rehearing on November 5, 1986, the time to file a petition for certiorari expired on February 3, 1987, and the time to docket an appeal expired on January 4, 1987.

149-50 (1942). Yet plaintiff purported to appeal from the three-judge district court's August 5, 1985 denial of reconsideration. App. B at 103.

On February 26, 1987, the Ninth Circuit issued the following order:

> Appellant's motion for clarification of our prior orders in this case is denied, as is his request for a stay of the transfer of his appeal to the Supreme Court. Appellant fails to comprehend that the jurisdiction of the Supreme Court under 28 U.S.C. § 1253 depends not on the nature of the issues he may seek to raise, but on the nature of the order entered by the district court. We will not entertain any further requests for reconsideration, clarification, or the like.
>
> Appellant, we note, has also sought an en banc hearing, expressly disavowing any desire for a rehearing en banc. His request is factually impossible and is denied on that ground.
>
> The Clerk will forthwith effectuate our order of August 19, 1986, by transferring this appeal to the Supreme Court of the United States. No further submissions from appellant will be received in this cause. The clerk shall return to appellant any proffered filings.

App. A at 672-73.[9]

On or about March 6, 1987, plaintiff resubmitted his application to Justice O'Connor. On March 10, 1987, the clerk's office wrote back stating:

> Inasmuch as the United States Court of Appeals for the Ninth Circuit by order dated February 26, 1987 denied your petition for rehearing, it would appear that you may now prepare and file with the Clerk of the Court a petition for writ of certiorari. Such a petition must be filed within ninety days of the date of denial of rehearing.

---

[9] Despite this Order, plaintiff on or about March 6, 1987, sent letters to Judge Browning and the Ninth Circuit Clerk seeking further reconsideration and submitted a petition for en banc reconsideration of the Order of February 26, 1987. He is now engaged in correspondence with the Ninth Circuit regarding the Clerk's rejection of his papers. *See* App. A at 677-85.

On May 27, 1987, plaintiff filed his 65-page Jurisdictional Statement, together with 1070 pages of appendices consisting largely of additional argument.

ARGUMENT

I

PLAINTIFF'S APPEAL IS UNTIMELY

In Section II below, we address the issues raised in plaintiff's Jurisdictional Statement and explain why his contentions are meritless and his requests should be rejected. This Court would be entirely within its prerogatives, however, to refuse even to consider plaintiff's contentions, for whether plaintiff's papers are viewed as a petition for certiorari or as a jurisdictional statement, they are untimely.

Plaintiff has already once been advised that his time to seek relief from this Court had expired. Following the Ninth Circuit's November 5, 1986 denial of his petition for rehearing, he submitted an "Application for Stay" to Justice O'Connor but later asked that she treat it as an application for an extension of time. He did not complete his application until February 23, 1987;[10] by then the time limits for docketing an appeal and petitioning for certiorari had both run.[11] The Supreme Court Clerk therefore rejected his papers, saying:

---

[10] Plaintiff initially submitted his application on January 22, 1987, but failed to include copies of the district court's orders with it. By letter dated February 9, 1987, the Supreme Court Clerk advised him that his papers could not be filed without those orders. The Clerk did not receive the necessary orders from plaintiff until February 23, 1987.

[11] The time limit for petitioning for certiorari is ninety days from the trigger date (here, the Ninth Circuit's November 5, 1986 denial of a rehearing). *See* Supreme Court Rule 20; 28 U.S.C. § 2101(c). The time limit for docketing an appeal pursuant to 28 U.S.C. § 1253 is sixty days from the filing of the notice of appeal. Supreme Court Rule 12. In this case, where plaintiff noticed his appeal to the wrong court, those sixty days presumably began to run when the Ninth Circuit denied plaintiff's petition for rehearing and thereby finalized the transfer of his appeal to

> Construing your papers as an application for an extension of time within which to file a petition for a writ of certiorari, . . . such application is out-of-time. Following the August 19, 1986 order transferring this case to the Supreme Court, you petitioned for a rehearing and the Court of Appeals denied the rehearing on November 5, 1986. The time to file such a petition for certiorari accordingly expired on February 3, 1987. If your papers were to be construed as an application for an extension of time to docket an appeal from the United States District Court, the time to docket such an appeal expired January 4, 1987. Any application for an extension of time must be presented to the Clerk within the time sought to be extended.
>
> Feb. 26, 1987 letter from
> Frances J. Lorsen,
> Chief Deputy Clerk,
> to Michael Halliwell.

Plaintiff's position presumably is that his so-called "Motion for Clarification of the Order of November 5, 1986 and For a Stay of Transfer of Plaintiff's Appeal to the United States Supreme Court" and his petition to the Ninth Circuit *en banc*, both submitted in early December 1986 (*see* Assembly App. A-11 and A-12), served to extend his time to file his jurisdictional statement. In effect, of course, those papers were a second petition for reconsideration, and indeed the Clerk of this Court referred to them as such in a letter to plaintiff on March 10, 1987. *Cf. Bowman v. Loperena*, 311 U.S. 262, 266 (1940) (treating a petition dated November 15, 1937 as a second petition for rehearing even though it was not labeled as such).

This second petition for rehearing, however, was itself untimely. Federal Rule of Appellate Procedure 40 sets a fourteen day time limit on petitions for rehearing, and that limit applies to second petitions for rehearing as well as to first petitions, *see, e.g.*

---

this Court. *But see Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982) (case brought to the Supreme Court after Ninth Circuit review on the merits dismissed because it should have been brought by direct appeal and appellants had missed the deadline for direct appeal).

United States v. Johnson, 457 U.S. 537, 540 n.4 (1982) (noting that the respondent had *timely* filed a second petition for rehearing in the Ninth Circuit). Plaintiff's papers, filed almost a month after the Ninth Circuit's November 5, 1986 denial of his first petition for reconsideration, did not comply with that limit.

Plaintiff's untimely petition for reconsideration was ineffective to extend the time limits for review by this Court. An untimely petition for reconsideration will not toll the time limits for review unless it actually leads to reconsideration on the merits:

> [W]here out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts if any are offered support, grounds for opening the original order and determines that no grounds for a reexamination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.
>
> *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 150 (1942).[12]

This Court's current rules specifically cover the effect of a petition for rehearing, providing that "if a petition for rehearing is *timely* filed by any party," the time for filing a petition for certiorari or notice of appeal "runs from the date of the denial of rehearing or of the entry of a subsequent judgment." Supreme Court Rules 11.3, 20.4 (emphasis added). "Where the motion for rehearing is filed out of time the time periods for seeking review by the Court are not affected even if the lower court entertains

---

[12] *See also Bowman v. Loperena, supra*, 311 U.S. at 266 ("The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal.").

and considers the motion." 13 Moore's Federal Practice ¶ 607.04[12], at 9-31.

Thus, under the current rules, plaintiff's untimely second petition for rehearing would have been ineffective to extend the time for seeking review even if it had led the Ninth Circuit to reexamine its order of August 19, 1986. But no such reexamination occurred; the Ninth Circuit merely denied the petition, observed that plaintiff failed to comprehend the basis for Supreme Court jurisdiction, and warned him that it would return any further filings. It is clear, then, that plaintiff's second petition for rehearing did not extend his time for seeking review in this Court. His "Jurisdictional Statement," whether viewed as such or as a petition for certiorari, was untimely. Even using the ninety-day period for petitions for certiorari, his time for seeking review expired on February 3, 1987, months before he filed his "Jurisdictional Statement" on May 27, 1987.[13]

This Court has on occasion "been generous in excusing errors of counsel." *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1966). It has recognized, however, that "if there are to be rules, there must be some limit to [its] willingness to overlook their violation." *Id.* Accordingly, it has dismissed numerous cases for untimely filing of the jurisdictional statement or petition for certiorari. *See, e.g., id.* (jurisdictional statement filed 22 days late); *Shapiro v. Doe*, 396 U.S. 488 (1970) (jurisdictional statement filed two days late). This case warrants such dismissal.

The Ninth Circuit notified Mr. Halliwell as early as April 26, 1984 that his appeal was directly to this Court. Assembly App. at A-2. Nonetheless, plaintiff persisted in attempting to seek Ninth

---

[13] The Supreme Court Clerk's March 10, 1987 letter to Mr. Halliwell, noting the Ninth Circuit's February 26, 1987 denial of his second petition for rehearing and advising him that his petition for certiorari must be filed within ninety days of the denial of rehearing, was obviously based on the erroneous but understandable assumption that his second petition for rehearing was timely. Mr. Halliwell was in no way prejudiced by that letter, because his time for seeking review had run long before it was written.

Circuit review. He has continually refused to recognize the finality of decisions, and has repeatedly sought second, third, and even more adjudications of issues that were resolved against him.

The Ninth Circuit indulged plaintiff by transferring his case to this Court rather than dismissing it outright. *Cf. Southway Discount Center v. City of Birmingham*, 568 F.2d 456 (5th Cir. 1978) (appeal from three-judge district court dismissed for lack of jurisdiction, citing 12 U.S.C. § 1253); *Weiser v. White*, 505 F.2d 912 (5th Cir.), *cert. denied*, 421 U.S. 993 (1975) (reapportionment appeals from three-judge district court dismissed for lack of jurisdiction). In response, he inundated the Ninth Circuit with both timely and untimely challenges to its decision, and broke this Court's procedural rules.

There is no cause for indulging him further. This Court has enforced its time restrictions in circumstances far more sympathetic than his. *See Donovan v. Richland County Ass'n for Retarded Citizens*, 454 U.S. 389 (1982). The appeal should be dismissed as untimely.[14]

II

THIS CASE DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL ISSUES

Plaintiff presents a litany of complaints against the courts below. He accuses them of "sabotag[ing]" his rights (Jur. Stmt. at 64-65) and "systematic obstruction of justice." *Id.* at x.

---

[14] Even if plaintiff's second petition for reconsideration had been timely filed and considered on the merits by the Ninth Circuit, the jurisdictional statement would be untimely because it was filed more than 60 days from the denial of the second motion for reconsideration. And, although the Clerk advised plaintiff he had 90 days to file a petition for certiorari, plaintiff obviously knew that it was a jurisdictional statement that was required and should have complied with the 60-day requirement. Nonetheless, we do not rely on that untimeliness here and the Court need not either. Plaintiff's time had already expired before he heard from the Clerk and any claimed reliance on the Clerk's letter would be illusory.

Plaintiff sees conspiracy and injustice where there is none. The lower courts went to great pains to identify and resolve any reviewable issues buried in the reams of paper presented by plaintiff. They responded to his claims with substantive discussions of the law and careful explanations of their rulings. When plaintiff was not satisfied and sought reconsideration, they considered his contentions and issued appropriate orders. They and their clerks' offices explained to plaintiff the procedural and filing requirements that applied to his case. And they tolerated and responded to a constant barrage of motions, correspondence, and complaints. In short, the courts below were fully attentive to plaintiff's procedural and substantive rights.

Contrary to plaintiff's assertions, the district judge initially assigned to this case properly exercised his authority in ruling on motions to dismiss that challenged the sufficiency of plaintiff's complaint. 28 U.S.C. § 2284(b)(3); *Swift & Co. v. Wickham*, 382 U.S. 111, 115 (1965); *AFSME v. Ogilvie*, 465 F.2d 221, 226 (7th Cir. 1972); *Lincoln v. California Adult Authority*, 435 F.2d 133, 134-35 (9th Cir. 1970). In any event, his order dismissing various of plaintiff's claims with prejudice was subsequently reviewed and affirmed by the full three-judge court. App. A at 258-64.

The three-judge district court likewise acted within its discretion in denying oral argument on some motions. Fed.R.Civ.Pro., Rule 78; E.D. Cal. Local Rule 230(h); *Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); *Hazen v. Southern Hills Nat'l Bank of Tulsa*, 414 F.2d 778, 780 (10th Cir. 1969). The court had the benefit of full briefing and had already heard from the plaintiff at length.

Nor did the court err in refusing to give weight to factual allegations that were not proffered in a legally cognizable way in plaintiff's opposition to a motion for summary judgment. Fed.R.Civ.Pro., Rule 56(e); *Klein v. Trustees of Indiana University*, 766 F.2d 275, 283 (7th Cir. 1985); *Rospindale Cooperative Bank v. Greenwald*, 638 F.2d 258, 261 (1st Cir.), *cert. denied*, 454 U.S. 831 (1981); *Mapco, Inc. v. Carter*, 573 F.2d 1268, 1282 (Temp. Emer. Ct. App. 1978), *cert. denied*, 437 U.S. 904 (1978); *Broadway v. City of Montgomery*, 530 F.2d 657, 660 (5th Cir.

1976). *See also Powers v. Dole*, 782 F.2d 689, 694 n.2 (7th Cir. 1986) ("Judicial notice of an unauthenticated government record is improper"). *Accord Celanese Co. of America v. Vandalia Warehouse Corp.*, 424 F.2d 1176, 1180 (7th Cir. 1970).[15]

And, contrary to plaintiff's contentions, discovery need not be allowed when it either is not necessary to resolve a claim or relates only to claims that have already been resolved. *Wyatt v. Kaplan*, 686 F.2d 276, 284 (5th Cir. 1982); *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1300 (8th Cir. 1980); *B.R.S. Land Investors v. United States*, 596 F.2d 353, 356 (9th Cir. 1979).

By 1984, when plaintiff moved to amend to add the California Supreme Court as a party defendant and to challenge plans enacted in January 1983, he was not entitled to amendment as of right. Whether amendment was appropriate lay within the broad discretion of the district court. Fed.R.Civ.Pro. 15(a); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981); *Mertens v. Hummell*, 587 F.2d 862, 865 (7th Cir. 1978); *Vickery v. Fisher Governor Co.*, 417 F.2d 466, 470 (9th Cir. 1969). Plaintiff did not bring his motion to amend until after the court granted summary judgment against him on the Assembly districts, dismissed his challenge to the Senate districts, and expressed grave doubts about his congressional challenge, *see* App. A at 297-335 (March 27, 1984 Order). The new reapportionment plans that he sought to add to his challenge had been enacted over a year previously.[16]

---

[15] Plaintiff's "evidence" regarding alleged population deviations in the Assembly plan would not have altered the result in any event. As the California Supreme Court found, the Assembly plan adopted by the California Supreme Court and challenged by plaintiff in federal district court had *at most* a 7% deviation from population equality. *Assembly v. Deukmejian, supra*, 30 Cal.3d at 666 n.21. This is well within the guidelines established by this Court. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *White v. Regester*, 412 U.S. 755 (1973); *see Connor v. Finch*, 431 U.S. 407, 418 (1977).

[16] The new Assembly and Senate plans were bipartisan statutes adopted by a two-thirds majority of the California Legislature and free of any serious challenge. *See* Cal. Elections Code §§ 30010-30011

And, as the court found, the proposed amendments would add nothing to the claims already resolved against plaintiff. App. A at 432.[17] Under these circumstances, it was entirely appropriate for

---

(Assembly), 30020-30022 (Senate); Cal. Const., art. IV, § 8(d). The congressional plan had only majority support, but it also had essentially perfect population equality, with a population deviation of only .0538%. *See Badham v. Eu*, 568 F.Supp. 156, 158 (N.D. Cal.), *aff'd*, 721 F.2d 1170 (1983), *cert. denied*, 470 U.S. 1084 (1984). At the time plaintiff moved to file a third amended complaint, his one-person one-vote claim was his only cognizable challenge to these plans. *See* App. A at 56-64 (July 1, 1982 Order); App. A at 304-306 (March 27, 1984 Order).

Since the entry of judgment by the three-judge district court, this Court has held that certain partisan gerrymander claims may be cognizable (*Davis v. Bandemer*, ___ U.S. ___, 106 S.Ct. 2797, 2816 (1986)), and a partisan gerrymander challenge to the congressional plan is in fact now pending in the Northern District of California. *Badham v. Eu*, No. C-83-1126 (N.D. Cal.) (three-judge district court, submitted on motions to dismiss). The decision in *Davis* does not change the result here, however. To the contrary, *Davis* reaffirms the judicial disinterest in disapproving bipartisan plans. 106 S.Ct. at 2809. *See also Gaffney v. Cummings*, 412 U.S. 735, 752-54 (1973) (bipartisan plan approved: "Judicial interest should be at its lowest ebb when a state purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so"). Moreover, even if partisan gerrymander claims had been clearly justiciable when the district court refused plaintiff's third amendment to his complaint, the court would not have abused its discretion in denying leave to amend under the circumstances presented.

[17] The proposed addition of the California Supreme Court as a party defendant would not only have failed to add anything, it would have been highly improper. What plaintiff sought by naming the California Supreme Court and in his underlying challenges to the court-ordered interim apportionment plans was the equivalent of having the district court issue a writ of mandamus ordering the California Supreme Court to comply with the district court's interpretation of federal law. The traditional use of the writ in the federal courts, however, has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roch v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); *accord, Will v. United States*, 389 U.S. 90, 95 (1967); *Platt v. Minnesota Mining &*

the district court to deny leave to amend. *See Roberts v. Arizona Board of Regents,* 661 F.2d 796, 798 (9th Cir. 1982) (affirming denial of motion to amend made after motion for summary judgment pending); *Vickery v. Fisher Governor Company, supra,* 417 F.2d at 470 (affirming denial of motion to amend made one month after summary judgment entered and two years after filing of lawsuit); *Glesenkamp v. Nationwide Mutual Ins. Co.,* 71 F.R.D. 1, 4 (N.D. Cal. 1974), *aff'd per curiam,* 540 F.2d 458 (9th Cir. 1976).

Finally, the district court acted properly when after disposing of plaintiff's Senate and Assembly challenges it invited motions and briefing to resolve the congressional claim. The court gave plaintiff full notice and an opportunity to address the matter. *See* App. A at 330-32, 335; *cf. Wong v. Bell,* 642 F.2d 359 (9th Cir. 1981) (trial court may dismiss complaint on its own initiative after affording plaintiff an opportunity to brief the matter). The court then issued an Order that discussed the applicable law in some detail. App. A at 440-449. Having disposed of all of the issues in the case, the court entered judgment. Assembly App. at A-10.[18]

Plaintiff's filing of post-judgment motions in the district court is simply one more example of his refusal or inability to accept judicial rules and rulings. The courts are not here to satisfy plaintiff's insatiable appetite for debate. The lower courts' refusal to engage in eternal dialogue with plaintiff was entirely proper.

Mfg. Co., 376 U.S. 240, 245 (1964). The only court that has any such power over the California Supreme Court—and the only proper court to review its actions in *Assembly v. Deukmejian*—is the United States Supreme Court, which has already declined to review the California court's decision. *Republic National Committee v. Burton, supra,* 456 U.S. 941 (1982) (dismissing appeal and denying certiorari).

[18] Plaintiff has argued that the district court neglected to address his challenge to the Board of Equalization districts. Jur.Stmt. at 47-50. Significantly, although plaintiff moved for reconsideration on the court's final dismissal of his case, he did not at that time raise this alleged deficiency. Moreover, the three-judge court could have reasonably relied upon plaintiff's own complaint, which "stipulated" to Board of Equalization districts which in 1982 were being considered by the State Legislature, to assume that plaintiff was not pursuing this claim.

CONCLUSION

The appeal should be dismissed or, in the alternative, the judgment below should be summarily affirmed.

Dated: June 26, 1987

Respectfully submitted,

JOSEPH REMCHO
KATHLEEN J. PURCELL*
BARBARA S. GAAL
JULIE M. RANDOLPH
REMCHO, JOHANSEN & PURCELL
Attorneys for the Assembly of the State of California

* Counsel of Record

APPENDIX

TABLE OF CONTENTS

October 29, 1982 letter from Supreme Court Clerk to Mr. Halliwell A-1

April 26, 1984 letter from Ninth Circuit Clerk to Mr. Halliwell A-2

May 9, 1984 letter from Supreme Court Clerk to Mr. Halliwell A-3

May 24, 1984 letter from Supreme Court Clerk to Mr. Halliwell A-4

June 11, 1984 letter from Mr. Halliwell to Justice Rehnquist A-5

June 11, 1984 letter from Mr. Halliwell to Supreme Court Clerk A-7

Notice of entry of judgment (Three-judge District Court) A-9

Judgment (Three-judge District Court) A-10

Plaintiff's Motion for Clarification of the Order of November 5, 1986 and for a Stay of Transfer of Plaintiff's Appeal to the United States Supreme Court (Filed December 3, 1986 in the Ninth Circuit) (Cover sheet only) A-11

December 1, 1986 letter from Mr. Halliwell to Chief Judge Browning, Ninth Circuit Court of Appeals, requesting *en banc* consideration A-12

Appendix

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

October 29, 1982

Mr. Michael J. Halliwell
2930 Colorado Avenue
D-18
Santa Monica, California 90404

RE: Michael J. Halliwell v.
March Fong Eu, Secretary of
State of California
A-401

Dear Mr. Halliwell:

Your application for injunction has been presented to Justice Rehnquist, who has endorsed thereon the following:

"Denied
W.H.R.
10/29/82."

The exhibits to your application are being returned under separate cover.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By
Francis J. Lorson
Chief Deputy Clerk

rjb
cc: Counsel of record

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit

[Letterhead]

April 26, 1984

Michael J. Halliwell, Pro Per
2930 Colorado Avenue, # D-18
Santa Monica, California 90404

Re: CA # 84-1859—MICHAEL J. HALLIWELL vs. MARCH FONG EU, etc.
D.C. # Cv-S-82-0147-LKK

Dear Mr. Halliwell:

Please disregard our letter advising that CA # 84-1859 has been assigned your appeal. The notice was forwarded to our office in error. We have contacted the district Court and advised that your appeal from the three judge decision is direct to the Supreme Court.

Sincerely your,

Phillip B. Winberry
Clerk of Court

By: GWENDOLYN BAPTISTE
Gwendolyn Baptiste
Deputy

cc: All counsel

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

May 9, 1984

Mr. Michael J. Halliwell
2930 Colorado Avenue
D-18
Santa Monica, California 90404

Re: Michael J. Halliwell v. March Fong Eu, et al.

No. A-872

Dear Mr. Halliwell:

Your application for an injunction in the above-entitled case has been presented to Justice Rehnquist, who has endorsed thereon the following:

"5/7/84—Treating the papers filed as an application under Rule 43, the application is denied."

W.H.R."

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By /s/ KATHERINE DOWNS
Katherine Downs
Assistant Clerk

gtb
cc: Counsel of record

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

May 24, 1984

Mr. Michael J. Halliwell
2930 Colorado Avenue
D-18
Santa Monica, California 90404

Re: Michael J. Halliwell v. March Fong Eu

No. A-872

Dear Mr. Halliwell:

Your "application to Justice Rehnquist seeking clarification of his Ruling of May 7, 1984" was received on May 21, 1984 and is herewith returned. It is not the practice of the Justice's of this Court to issue clarifications regarding rulings on applications to individual Justices.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By /s/ KATHERINE DOWNS
Katherine Downs
Assistant Clerk

gtb

Michael J. Halliwell
2930 Colorado Avenue D-18
Santa Monica, California 90404
June 11, 1984

Mr. Justice William Rehnquist
United States Supreme Court
Washington, D.C. 20543

Letter of Conveyance for Resubmission of Application in Halliwell v. Eu (Eastern Dist. Cal. CIV.S. 82-147-LKK)

Dear Justice Rehnquist:

Halliwell v. Eu, a statewide reapportionment case, was filed on February 19, 1982, but in spite of the requirement of 28 U.S.C. § 2284(b)(2), which provides, "the hearing shall be given precedence, and held at the earliest practicable day," nothing of substance has yet been adjudicated by the three-judge panel conducting proceedings in this case. On January 27, 1984 and on two subsequent occasions plaintiff made application to his Circuit Justice seeking enforcement of the expedited consideration requirement of § 2284.

These applications were rejected, either without citing any rule of the Court or citing a rule that was plainly inapplicable. Therefore on April 7, 1984 plaintiff attempted to file a motion under Rule 42 to secure the enforcement of Rule 43.1. This motion was rejected by the same clerk (Ms. Katherine Downs) who had rejected two of the three prior motions. After appealing to the Clerk of the Court plaintiff was finally allowed to file the motion of April 7, along with a second motion relating to jurisdictional questions raised by the Ninth Circuit in connection with a forthcoming appeal. However, the motion seeking enforcement of Rule 43 and the motion seeking jurisdictional clarification were somehow construed as an application for an injunction and denied on that basis. Shortly after this May 7, 1984 ruling Deputy Clerk Marianne Matherly of the Eastern District renewed the Ninth Circuit's request for jurisdictional clarification. To facilitate this, plaintiff made application on May 21, 1984 for clarification of the ruling of May 7. But this was rejected by Ms. Downs on the grounds that "It is not the practice of the Justices of this court to

issue clarifications regarding rulings on applications to individual Justices." Since the May 7 ruling treated motions which were not a request for an injunction as if they were, the parties to *Halliwell v. Eu,* the District Court, and the Ninth Circuit are left bewildered.

The request for clarification which is herewith resubmitted is structured so that all that is required to untangle the present situation is a simple granting or denial (or rejection on jurisdictional grounds) for each of the four motions included. To facilitate consideration of this matter, copies of the two motions which were the subject of the May 7 ruling and the letter of Ms. downs (sic) communicating that ruling to the parties are also enclosed.

Respectfully,

/s/ MICHAEL J. HALLIWELL
Michael J. Halliwell
Plaintiff in Propria Persona

Enclosures

2930 Colorado Ave. D-18
Santa Monica, California 90404
June 11, 1984

Mr. Alexander L. Stevas
Clerk
United States Supreme Court
Washington, D.C. 20543

Dear Mr. Stevas:

I much appreciate your having my submission of April 27 forwarded to Justice Rehnquist, but whatever instructions you issued must have miscarried; for Ms. Downs subsequently notified me that Justice Rehnquist had issued a ruling which bears no relation to the nature of the motions submitted, and when I sought clarification she rejected my application, informing me that clarifications are not issued by individual Justices.

The treatment of two procedural motions as if they were an application for an injunction, followed by refusal to forward an application designed to untangle the resulting confusion, leaves my case in limbo, since the request of the Ninth Circuit and the Eastern District of California (made to me and to you, respectively) for jurisdictional clarification from the Supreme Court remains unanswered: The Court has neither provided such clarification nor said that it will not do so. It will be easy to rectify this situation, as I framed my request for clarification in the form of four motions each of which a Justice can either grant or deny or decline to rule upon for jurisdictional reasons.

I herewith resubmit my request for clarification and the two motions which were mistakenly treated as an application for injunction and denied accordingly. I am adding a very short explanation of the procedural situation as it now exists and of why some sort of ruling is essential in a letter of conveyance to Justice Rehnquist. Thank you for your assistance in this matter.

Sincerely,

/s/ MICHAEL J. HALLIWELL
Michael J. Halliwell
Plaintiff in Propria Persona

Enclosures

United States District Court
for the
Eastern District of California

No. Civ S-82-147-LKK

MICHAEL J. HALLIWELL
vs.
MARCH FONG EU

NOTICE

To Browne & Woods
2040 Ave. of the Stars, 4th Fl.
Los Angeles, CA 90067

Michael Halliwell
2930 Colorado Ave., D-18
Santa Monica, CA 90404

Richard Meness, Staff Counsel
for the Secretary of State
1230 J St.
Sacramento, CA 95814

See attached list

YOU ARE HEREBY NOTIFIED THAT: Judgement was entered in this action on 7-9-85.

JAMES R. GRINDSTAFF,
CLERK

By: /s/ S. GERSTENAU
Deputy Clerk

Sacramento, California
Dated: 7-9-85

JUDGMENT IN A CIVIL CASE

United States District Court
Eastern District of California
Civ S-82-147-LKK
Lawrence K. Karlton

Michael J. Halliwell

v.

March Fong Eu et al

[Filed July 9, 1985]

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the above-named case is hereby dismissed.

Judgment is entered accordingly.

Clerk
J.R. GRINDSTAFF

(By) Deputy Clerk
S. GERSTENAU

[cover sheet only]

Michael J. Halliwell
2930 Colorado Ave. #D-18
Santa Monica, CA 90404
Telephone: (213-) 829-2821

Civil Suit 82-147-LKK
C.A. # 85-2496

In the United States Court of Appeals
For the Ninth Circuit

Michael J. Halliwell,
Plaintiff-Appellant,

vs.

March Fong Eu,
Secretary of State of the
State of California, et al.,
Defendants-Appellees

PLAINTIFF'S MOTION FOR CLARIFICATION OF THE ORDER OF NOVEMBER 5, 1986 AND FOR A STAY OF TRANSFER OF PLAINTIFF'S APPEAL TO THE UNITED STATES SUPREME COURT

[Filed Dec. 3, 1986]

1) The legal basis for this court's denial of jurisdiction over Plaintiff's August 31, 1985 petition for mandamus remains totally obscure.

2) These issues raised in prior briefing must be addressed by this court.

3) Plaintiff's motion to stay the transfer of his appeal

2930 Colorado Ave. #D-18
Santa Monica, CA 90404
December 1, 1986

Chief Judge James R. Browning
Ninth Circuit
United States Court of Appeals
P.O. Box 547
San Francisco, CA 94101

Re: C.A. 85-2496

Dear Judge Browning:

Although the order of November 5, 1986 of Judges Tang, Brunetti and Kozinski is the occasion for this petition, the petition is not a request for reconsideration but a request for initial *en banc* consideration pursuant to Ninth Circuit rule 13(e)(2), with the required 33 copies.

Plaintiff's mandamus appeal sought relief from eight specific procedural grievances against the District Court considering *Halliwell v. Eu* (Civ.S. 82-147-LKK, Eastern District of California). The Ninth Circuit waited 14 months and then alleged lack of jurisdiction. The Court made no reference at all to the circumstances of the case. Plaintiff contends that it is indefensible for a circuit court to find an appeal to be within that narrow group requiring mandatory consideration on direct appeal to the Supreme Court yet offer no explanation of why it rejects all of the plaintiff's contentions that the case still belongs in the lower courts.

Moreover, this superficial yet protracted treatment of Plaintiff's petition for mandamus is only the latest in a five-year-long series of refusals to rule on the funamental aspects of this case.

At this juncture it is clearly essential to identify and correct the cause of this breakdown in adjudication of a case which is specially entitled to expeditious consideration under 28 U.S.C. § 2284. Plaintiff's petition to the Ninth Circuit *en banc* therefore calls upon the Court to implement fact-finding and remedial procedures necessary to bring the handling of this case into conformity with the Federal Rules of Civil Procedure.

Judicial misconduct "directly related to the merits of a decision or procedural ruling" may not be considered under normal Ninth Circuit misconduct procedures, so *en banc* consideration is necessary. The Eighth Circuit affirmed the appropriateness of *en banc* consideration in a case where the judicial misconduct was not nearly so serious or widespread as that alleged in *Halliwell v. Eu.* Indeed, the Eighth Circuit *en banc* in *Reserve Mining Co. v. Lord, District Judge* (1976) 529 F.2d 181, 188 notes the overwhelming importance of maintaining the integrity of its own judicial process:

> "Our system of government is premised upon subservience to the rule of law. If a judge in the exercise of judicial power loses sight of these principles the result is autocratic rule by lawless judicial action."

Also in *Reserve Mining supra* the Court ruled that it was appropriate for it to take necessary corrective action on its own initiative once the circumstances requiring such action were called to its attention.

In a motion of this date Plaintiff is asking Judges Tang, Brunetti, and Kozinski to replace their wholly unexplained order of November 5, 1986 with one explaining their grounds for denying Plaintiff's August 26, 1986 motion for reconsideration. If they have not granted this motion within a reasonable time, it would be appropriate for the Ninth Circuit *en banc* to simply vacate the Order of November 5, 1986 and require that it be replaced with one which provides a reasoned disposition of the jurisdictional question which was decided without explanation by that order. In *Sparks v. Duval County Ranch Co.* (1979) 604 F.2d 976, 976 the *en banc* court affirmed its power, where judicial misconduct was involved, "to recall and reform a mandate even after issuance."

Plaintiff's ability to seek certiorari from the Supreme Court regarding the order of November 5, 1986 in a cogent manner is handicapped by the absence of the reasoned opinion required by *Virginian Railway Co. v. United States* (1926) 272 U.S. 658, 675. The clock is running on the time for Plaintiff to do this, so Plaintiff must promptly secure a Ninth Circuit remedy to protect his right to effective appellate review or a ruling that he is not entitled to such a remedy. *Plaintiff therefore requests that the Court notify him as soon as possible of its action or any decision not to act on this petition.*

Respectfully,

/s/ MICHAEL J. HALLIWELL
Michael J. Halliwell
Plaintiff-appellant in Propria Persona

cc: Service list